TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 22

IRVING TRUST COMPANY, AS TRUSTEE IN BANKRUPTCY OF OUTFITTERS OPERATING REALTY CO., INC., PETITIONER,

vs.

A. W. PERRY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 16, 1934.

CERTIORARI GRANTED MAY 14, 1934.

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IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

In the Matter of Outfitters Operating Realty Co., Inc. (a Delaware corporation), Bankrupt

Statement Under Rule XIII

This case comes up on appeal from an order of the United States District Court for the Southern District of New York confirming an order of the Referee in Bankruptcy. The order of the District Court from which this appeal is taken was entered on August 11, 1933.

The bankrupt herein is Outfitters Operating Realty Co., Inc., a Delaware corporation. It filed a voluntary petition in bankruptcy on September 30, 1932, and on that date, by an order entered in the United States District Court for the Southern District of New York, was adjudicated a bankrupt and the matter was referred to Hon. Irwin Kurtz, Referee in Bankruptcy.

The appellant is A. W. Perry, Inc., a corporation organized under the laws of the State of Massachusetts.

Attorneys for the appellant are Larkin, Rathbone & Perry.

The respondent is Irving Trust Company, a corporation [fol. 2] organized under the laws of the State of New York. The said Irving Trust Company was duly elected Trustee in Bankruptcy of the bankrupt herein on October 15, 1932, and on October 18, 1932, duly qualified and has since acted as such Trustee.

Counsel for said Trustee in Bankruptcy are Beekman, Bogue & Clark. Said counsel were appointed by an order of the Referee in Bankruptcy, dated October 19, 1932, and a supplemental order, dated November 3, 1932.

Proof of claim herein was filed by appellant on Mar. 29, 1933.

An order to show cause why the claim should not be disallowed and the proof of claim expunged was signed by the Referee on April 5, 1933, upon petition of the Trustee in Bankruptcy.

Said order to show cause came on for hearing before the Referee on April 18, 1933.

The order of the Referee disallowing the claim was entered June 1, 1933.

The petition for review was filed by the appellant on June 12, 1933.

The certificate of the Referee certifying the cause to the United States District Court for the Southern District of New York was signed on June 13, 1933.

The hearing before the United States District Court was on July 5, 1933.

The order allowing the appeal, and the citation, were signed by Hon. John M. Woolsey, United States District Judge, on September 6, 1933.

There has been no change of parties or attorneys herein.

Stipulation and order re Record on Appeal was filed September 14, 1933.

[fol. 3] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In Bankruptcy. No. 55384

In the Matter of OUTFITTERS OPERATING REALTY CO., INC. (a Delaware corporation), Bankrupt

PETITION OF IRVING TRUST CO.

To the Honorable Irwin Kurtz, Referee in Bankruptcy:

The petition of Irving Trust Company, as Trustee in Bankruptcy herein, respectfully shows to the Court as follows:

On October 15, 1932, your petitioner was duly appointed and qualified as Trustee in Bankruptcy of the above named Bankrupt and is acting as said Trustee.

That there has been filed with this Court a proof of claim numbered 27, by A. W. Perry, Inc., setting forth an alleged claim of said A. W. Perry, Inc., against the bankrupt in the sum of $177,788.

Your petitioner objects to the allowance of said claim for the following reasons:

That said alleged claim is for damages for breach of a covenant to pay rent under a lease; that no part of said rent from non-payment of which said damages are alleged [fol. 4] to arise, was due and payable at the date when the petition in bankruptcy was filed herein; and that therefore the said claim is not provable in bankruptcy.

Your petitioner, accordingly, desires to have its objections to said claim heard and determined, and said claim reconsidered and re-examined in accordance with the applicable provisions of the Bankruptcy Act.

Wherefore, your petitioner respectfully requests that an order be entered herein,

Ordering that said Claimant appear before this Court at a time and place to be fixed by this Court to show cause, if any there be, why an order should not be made and entered herein disallowing and rejecting said claim, expunging the proofs of said claim hereinabove referred to and ordering that no dividend be paid thereon.

Dated April 5, 1933.

Irving Trust Company, as Trustee in Bankruptcy, by Joseph T. Stearns, Assistant Secretary. Beekman, Bogue & Clark, Attorneys and Solicitors for Irving Trust Company, Trustee in Bankruptcy of Outfitters Operating Realty Co., Inc. (Delaware), 15 Broad Street, Borough of Manhattan, New York, N. Y.

[fol. 5] *Duly sworn to by Joseph T. Stearns. Jurat omitted in printing.*

Affidavit of Service annexed.

[fol. 6] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO SHOW CAUSE

Upon reading and filing the annexed ex parte petition of Irving Trust Company, Trustee in Bankruptcy of Outfitters Operating Realty Co., Inc., the bankrupt herein, verified April 5, 1933, and sufficient cause appearing therefor, it is,

on motion of Beekman, Bogue & Clark, attorneys and solicitors for said Trustee.

Ordered, that A. W. Perry, Inc. (hereinafter called "Claimant"), show cause, if any there be, before me at a hearing to be held at No. 15 Park Row, in the Borough of Manhattan, City and State of New York, on the 18 day of April, 1933, at 11 o'clock in the forenoon, or as soon thereafter as counsel may be heard, why an order should not be entered herein disallowing and rejecting the claim of the Claimant set forth in the proof of claim filed herein and numbered 27, expunging said proof of claim, and ordering that no dividend be paid thereon.

[fol. 7] Further Ordered, that due and timely service of this order to show cause be made by mailing a copy thereof, together with said petition of the Trustee, on or before April 6th, 1933, to the Claimant at the address of the Claimant appearing on said proof of claim, and by serving a copy of this order to show cause and petition on Larkin, Rathbone & Perry, Esqs., attorneys for Claimant, at their office at No. 70 Broadway, Borough of Manhattan, City, County and State of New York.

Dated New York, N. Y., April 5, 1933.

Irwin Kurtz, Referee in Bankruptcy.

[fol. 8] IN UNITED STATES DISTRICT COURT

[Title omitted]

POWER OF ATTORNEY AND PROOF OF DEBT

At Boston, in the District of Massachusetts, on the 28th day of March, A. D. 1933, came Winthrop I. Perry of Rockland, in the County of Plymouth, and State of Massachusetts, and made oath and says that:

1. He is acting Treasurer of the A. W. Perry, Inc., a corporation, incorporated by and under the laws of the State of Massachusetts and carrying on business at Boston, in the County of Suffolk, and State of Massachusetts, and that he is duly authorized to make this proof, and says that the said Outfitters Operating Realty Co., Inc., the person by whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still

is, justly and truly indebted to said corporation in the sum of One Hundred Seventy-seven Thousand Seven Hundred Eighty-eight dollars; that the consideration of said debt is as follows: Damages for breach of covenant to pay rent under a lease, a copy of which is hereto annexed that [fol. 9] no note or judgment has been received by or in favor of this claimant upon said account unless otherwise set forth herein; that no part of said debt has been paid; that there are no set-offs or counterclaims to the same, and that there has been received no manner of security for said debt whatever.

Winthrop I. Perry.

Subscribed and sworn to before me this 28th day of March, A. D. 1933. Richard J. Walsh, Notary Public in and for the County of Suffolk and State of Massachusetts. (Notarial Seal.)

To Albert Stickney, Francis S. Bensel, and/or Theodore Pearson:

The Undersigned, A. W. Perry, Inc., a corporation duly organized under the laws of Massachusetts and having a usual place of business in Boston, in the County of Suffolk and State of Massachusetts, do hereby authorize you, or any one of you, to attend the meeting or meetings of creditors of the bankrupt aforesaid at a court of bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said court in said matter or at such other time and place as may be appointed by the court for holding such meeting or meetings, or at which meeting or meetings, or any adjournment or adjournments thereof may be held, and then and there from time [fol. 10] to time, and as often as there may be occasion for or in the name of the undersigned to vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the estate of said bankrupt, and for the undersigned to assent to such appointment of trustee, and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held therein for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and

to receive payment of dividends and of money due the undersigned under any composition, and for any other purpose in whatsoever interest of the undersigned, with full power of substitution, and the undersigned does hereby revoke any and all prior powers of attorney that may have been given by the undersigned.

In witness whereof, the name and seal of the undersigned is hereby affixed the 28th day of March, A. D. 1933.

A. W. Perry, Inc., by Winthrop I. Perry, Treas.

Signed, sealed and delivered in presence of Richard J. Walsh.

Acknowledged before me this 28th day of March, A. D. 1933. Richard J. Walsh, Notary Public in and for the County of Suffolk and State of Massachusetts. (Notarial Seal.)

[fol. 11] EXHIBIT TO PROOF OF DEBT

Lease

This Indenture, made the 28th day of January in the year nineteen hundred twenty-nine between A. W. Perry, Inc. hereinafter called the Lessor, and Lerner Stores Corp., a Delaware corporation, hereinafter called the Lessee,

Witnesseth: The lessor do- hereby grant, demise, and lease unto the Lessee the premises situated in Boston, Massachusetts, known and described as store and basement 459 Washington Street.

The lessee has the privilege of subletting the basement to the Wilbar Shoe Store or to the Ginter Company or to any other tenant not reasonably objectionable to the lessor.

Provided the premises are rented to the Wilbar Shoe Store or the Ginter Company the lessee has the privilege of connecting the basement with their premises. The lessee may make such improvements and alterations, including a new front, as it desires, said improvements not to be structural improvements.

The premises are to be used by the lessee for the sale of women's wearing apparel, shoes excepted.

The lessor shall not cancel this lease on account of fire unless its lease of the entire building is cancelled for the same cause.

Commencing January 1935 the lessee shall pay as additional rent 2/7th of all taxes assessed on the Dexter Building and land over and above the tax assessed for the year 1927, amounting to $45,750. This tax is to be paid on October 1st of each year. In no event shall the rent and taxes average over $45,000 per annum from January 1, 1935 to [fol. 12] the expiration of this lease.

To Have and to Hold the same to the Lessee for the full term of fifteen years and ten months from noon of the first day of March 1929.

The Lessee hereby covenant- and agree-, (except as herein otherwise provided) to pay rent for the said premises at the rate of Thirty-five thousand ($35,000) dollars per annum for the first ten months, Thirty-six thousand nine hundred forty-eight ($36,948) dollars per annum for five years, Thirty-eight thousand three hundred seventy-six ($38,376) dollars per annum for five years, and Thirty-nine thousand eight hundred and five ($39,805) dollars per annum for five years dollars yearly, by equal monthly payments of Twenty-nine hundred and sixteen 67/100 dollars for the first ten months, Three thousand and seventy-nine dollars for five years, Three thousand one hundred and ninety-eight dollars for five years and Three thousand three hundred and seventeen and 09/100 dollars for the last five years.

— dollars on the first day of each month so long as the Lessee shall hold hereunder and on the first day of each succeeding month thereafter the first monthly payment to be made on the first day of March 1929; to use the demised premises only for ——; also, to pay all water rates or charges; to keep the premises, including the glass, sidewalk Hyatt lights, water, steam and gas piping, and electric and all other fixtures and machinery, in or on the prem- [fol. 13] ises (admitted now to be whole and in good order), in the same condition as the same are in at the commencement of said term, or may be put in during the continuance thereof, reasonable use and wear and damage by fire or other unavoidable casualty only excepted; (to keep the sidewalks bordering on said premises free from snow and ice;) not to overload, damage or deface the premises; not to drill any holes therein, or post or place thereon any sign, placard, or awning, except by written assent of the Lessor; not to use the premises for the storage of any articles or

for any purpose which will increase the ordinary rates of insurance upon said building or its contents, and to pay all extra insurance, if any, caused to Lessor by the Lessee use of the premises; not to use the premises for the storage or sale of spirituous or intoxicating liquors, or for an eating house; not to carry on any trade or occupation on the premises, nor make any use thereof which shall be unlawful, improper, noisy or offensive, or contrary to any law, ordinance, or by-law governing the premises; to comply with all the requirements of the Boston Board of Fire Underwriters, and State and City Laws and regulations now or hereafter in force, and with all reasonable rules now or hereafter made by the Lessor for the care of said building; not to assign this lease nor underlet in whole or part, without the written consent of the Lessor; to make no addition or alteration to or upon the premises, without the written consent of the Lessor; to allow the Lessor at reasonable times to enter and examine the premises and make repairs, improvements, or alterations of the [fol. 14] granted premises, or other parts of its estate, if desired, the prosecution of which does not unreasonably impair the Lessee use and enjoyment; to allow the Lessor during the last three months of the term, in any reasonable manner to affix and keep on the premises notice or notices "To Let," or "For Sale," to save the Lessor harmless from all loss or damage occasioned by the use or misuse of water, or of the plumbing, steam-heating apparatus, gas or other fixtures, or by the bursting or leakage of any pipes, or by any nuisance made or suffered on the premises; to indemnify and save the Lessor harmless from all loss or damage to persons or property in or about the premises whether occasioned by the escape of water or otherwise; and, at the expiration of the term, to yield up to the Lessor the premises and all additions to and improvements of the same in condition as herein agreed. No charge shall be made by the Lessor for any steam heat furnished in or for use of elevators to or from the demised premises, all of which it is the intention of the Lessor to furnish in such manner and at such times as are usual in buildings of a similar class, but the Lessor shall not be liable for failure to furnish any of the same or for any loss or damage resulting from such failure. The Lessor reserves the right to transmit through the demised premises to or from

other parts of said building or of any adjoining building any agency for light, heat or power used in buildings of a similar class, and the Lessee covenants and agrees to purchase and take from the Lessor all the electric current used [fol. 15] by the Lessee upon the demised premises and to pay therefor in monthly installments, with the rent, at the rates charged by the Edison Electric Illuminating Co. of Boston for similar service under the same conditions.

All merchandise, furniture and property of every kind, which may be on or about the premises during the term, shall be at the sole risk and hazard of the Lessee.

No waiver of or assent by the Lessor to any breach of the Lessee covenants shall be deemed a waiver of any other or future breach whatsoever.

The Lessee waive all demand and notice on account hereof.

This Lease is made on condition that, in case the premises, or the estate of which they may form part, be in whole or part destroyed or damaged by fire, or other unavoidable casualty, or if said estate be in whole or part taken by public authority for any public purpose, this lease may, at the election of the Lessor, be terminated; provided, that, if the same be not so terminated, a just and proportionate part of the rent shall be suspended or abated until the premises shall have been put by the Lessor in as good condition as at the date of such damage or taking; and the Lessee hereby assigns to the Lessor any and all claims and demands for damages on account of such taking.

This Lease is made on condition, also that if the Lessee shall neglect or fail to perform or observe any of the covenants herein contained on the Lessee's part to be performed [fol. 16] or observed, and except the covenant for the payment of rent, such default shall not be cured within twenty days after written notice by Lessor to Lessee at its main office or if the estate hereby created shall be taken on execution or other process of law, or if any assignment shall be made of the Lessee's property for the benefit of creditors, or if a receiver, guardian, conservator, or other similar officer shall be appointed to take charge of any property of or to wind up the affairs of the Lessee, and such receiver or other officer be not removed within twenty days then and in either of the said cases the Lessor lawfully may, imme-

diately or at any time thereafter and without demand or notice, enter into and upon the demised premises or any part thereof in the name of the whole and repossess the same as of the Lessor's former estate, and expel the Lessee and those claiming through or under the Lessee, and remove the effects of both or either (forcibly, if necessary) without being deemed guilty of any manner of trespass and without prejudice to any remedies for arrears of rent or preceding breach of covenant, and upon entry as aforesaid the Lessee's estate shall end, and, in the event of any such termination or of termination under statute for default of the Lessee, the Lessee will pay to the Lessor, as damages, a sum which at the time of such termination represents the difference between the rental value of the premises and the rent and other payments herein named for the residue of the term; and, for the more effectual securing to the Lessor of the rent and other payments herein pro-
[fol. 17] vided, it is agreed as a further condition of this lease that the filing of any petition in bankruptcy or insolvency by or against the Lessee shall be deemed to constitute a breach of this lease, and thereupon, ipso facto and without entry or other action by the Lessor, this lease shall become and be terminated; and, notwithstanding any other provisions of this lease, the Lessor shall forthwith upon such termination be entitled to recover damages for such breach in an amount equal to the amount of the rent reserved in this lease for the residue of the term hereof less the fair rental value of the premises for the residue of said term.

And the Lessor covenant and agree that the Lessee, paying the rent as aforesaid, and performing the covenants herein contained, shall peaceably hold and enjoy the premises without hindrance or interruption, except as herein provided.

The words "Lessor" and "Lessee" wherever used in the foregoing instrument, shall include legal representatives and assigns, and the covenants of the Lessees are the joint and several obligations of each party signing as Lessee.

In witness whereof, the said parties have hereunto, and to a duplicate hereof, set their hands and seals the day and year first above written.

A. W. Perry, Inc., H. G. Perry, Pres. (L. S.).
Lerner Stores Corporation (L. S.), by Joseph J. Lerner, Pres. (Seal.)

[fol. 18] STATE OF NEW YORK,
County of New York, ss:

On this 26th day of March, 1929, before me appeared Joseph J. Lerner, to me personally known, who, being by me duly sworn, did say that he is the President of Lerner Stores Corporation, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and said Joseph J. Lerner acknowledged said instrument to be the free act and deed of said corporation.

J. H. Hersch, Notary Public, State of New York. New York Co. Clerk's No. 598. New York Co. Reg. No. O-798. Commission Expires March 30, 1930. (Seal.)

[fol. 19] IN UNITED STATES DISTRICT COURT

LETTER FILING PROOF OF CLAIM

March 29, 1933.

Hon. Irwin Kurtz, Referee in Bankruptcy, 15 Park Row, New York City

In the Matter of Outfitters Operating Realty Co., Inc., Bankrupt—No. 55384

DEAR SIR: On behalf of our client, A. W. Perry, Inc., we file with you herewith its proof of claim in the above matter in the amount of $177,788, and its power of attorney to Albert Stickney, Francis S. Bensel and/or Theodore Pearson, attached to which is photostatic copy of the lease referred to in the proof of claim.

By the filing of this proof of claim, A. W. Perry, Inc., does not waive but reserves all rights and claims against all persons, firms and corporations.

Will you be good enough to acknowledge receipt of the enclosures by stamping the enclosed carbon copy of this letter and returning it by the bearer.

Very truly yours, (Sgd.) Larkin, Rathbone & Perry.

TP:HL.

Enclosures.

Stamped—In re Outfitters Operating Realty (Del.) Received above proof of claim and filed the same this 29 day Mar., 1933.

Irwin Kurtz, Referee in Bankruptcy

[fol. 20] In United States District Court, Southern District of New York

In Bankruptcy. No. 55384

In the Matter of Outfitters Operating Realty Co., Inc., a Delaware Corporation, Bankrupt

Hearing of April 18, 1933

New York, April 18, 1933,
11:15 o'clock A. M.

Before Irwin Kurtz, Esq., Referee

Hearing on order to show cause to disaffirm claim designated as No. 27.

Proceeded pursuant to notice.

Appearances:

Messrs. Beekman, Bogue & Clark, attorneys for the Trustee, by John A. McNaughton and Daniel James, Esqs., of counsel.

Messrs. Larkin, Rathbone & Perry, attorneys for A. W. Perry, Inc., claimant, by Theodore Pearson, Esq., of counsel.

Robert P. Levis, Esq., attorney for Lerner Stores Corporation of Maryland.

Bertram L. Marks, Esq., attorney for the bankrupt.

[fol. 21] Mr. McNaughton: This is a motion made for an order disallowing and rejecting the claim of A. W. Perry, Inc., filed in the sum of $177,788 for alleged damages for breach of covenant to pay rent under lease.

(Informal discussion off the record.)

Mr. Levis: The objection of the trustee to the claim of A. W. Perry, Inc., addresses itself solely to the provability of the claim at the present time.

It is stipulated that in case the Referee shall find that the claim is a provable claim, the question of the amount at which it shall be allowed is reserved and the parties may thereafter offer testimony liquidating the amount, if any.

The Referee: Is that stipulation satisfactory?

Mr. Pearson: Yes, on the understanding of the question I raised before, that it is without prejudice to whatever rights the claimant may have by virtue of any prima facie case made out by the filing of the proof of claim.

(Argument by Mr. McNaughton, followed by general discussion off the record.)

The Referee: Do you want to submit a memorandum in opposition?

Mr. Pearson: Yes, I think that would be desirable.

The Referee: How much time do you want?

Mr. Pearson: How would next Monday do?

The Referee: All right, you serve a copy of your memorandum on your opponent by April 24th.

Mr. Pearson: That is on Mr. McNaughton?

The Referee: Yes.

[fol. 22] Mr. Levis, do you want to submit a memorandum in addition to the memorandum served by the trustee?

Mr. Levis: I will serve my friend also by the 24th; we will simply exchange.

The Referee: Do you want time to reply, Mr. McNaughton?

Mr. McNaughton: I should judge about three days.

The Referee: All right, April 27th for reply.

Thereupon, at 11:20 o'clock, A. M., the matter was adjourned as follows: Claimant's memorandum to be served by April 24, 1933; reply memorandum to be served by April 27, 1933.

[fol. 23] IN UNITED STATES DISTRICT COURT

[Title omitted]

DECISION

This is an application by the Irving Trust Company, as Trustee herein, for an order to reject and disallow the claim herein of A. W. Perry, Inc. (hereinafter called the

Claimant), in the sum of One hundred seventy-seven thousand seven hundred and eighty ($177,780) Dollars, as "damages for breach of a covenant to pay rent under a lease." The Trustee maintains that this claim is, in fact, for the payment of future rent, and therefore not provable in bankruptcy.

It appears that on January 28th, 1929, the claimant and the Bankrupt entered into a lease covering a store and basement in premises located at 459 Washington Street, Boston, Massachusetts, for a term of fifteen (15) years and ten (10) months, from March 1st, 1929, at a graded rental commencing at Thirty-five thousand ($35,000) Dollars per annum. The clause of the lease upon which the claim herein is based is, as follows:

[fol. 24] "* * * *for the more effectual securing to the lessor of the rent* and other payments herein provided, it is agreed as a further condition of this lease that the filing of any petition in bankruptcy or insolvency at or against the lessee shall be deemed to constitute a breach of this lease, and thereupon *ipso facto* and *without any entry* or other action by the Lessor, this lease shall become and be terminated; and notwithstanding any other provisions of this lease, *the Lessor shall forthwith upon such termination be entitled to recover damages for such breach in an amount equal to the amount of the rent reserved in this lease for the residue of the term hereof less the fair rental value of the premises for the residue of said term.*" (Italics mine.)

After the making of this lease the Bankrupt entered into the possession of the demised premises, paid the rent therefor, and on September 30th, 1932 was duly adjudicated a Bankrupt—at the time of the adjudication there was no rent due.

The Trustee's application to reject this claim herein rests entirely upon the legal effect to be given in bankruptcy to the ipso facto provisions of the said clause of the lease. In determining this question it may be well to point out a landlord's rights against a tenant both at common law as well as in bankruptcy in the absence of any special clause in the lease. Undoubtedly, the limited rights and remedies of a landlord under such circumstances caused the insertion of this clause in the lease herein.

At common law, an abandonment of premises by a tenant [fol. 25] does not give a landlord an immediate action for damages based upon the future rent of the term. In the absence of a special covenant, a landlord upon such abandonment may at his option (1) allow the premises to remain vacant and recover from the tenant as the rent accrues or (2) enter and terminate the contract, accepting a surrender and thereby giving up any rights against the tenant for future rent, or (3) sublet the premises for the benefit of the tenant and recover for any loss incurred when the term has expired.

Thus, a Landlord at common law has a claim for damages for the total amount thereof whether the premises are permitted to remain vacant or relet for the tenant, but as pointed out such claim does not mature until the expiration of the term—(in this case such expiration is thirteen [13] years and [3] months after the adjudication). Moreover, the amount of a Landlord's damages upon such abandonment of premises is contingent and uncertain and, of course, can only be ascertained at the end of the term. Consequently, a Landlord upon the abandonment of the premises because of the bankruptcy of a tenant could only prove a claim in bankruptcy for the amount of the rent which had accrued prior to adjudication and had no claim for the future accruing rent.

In order to overcome this situation, the Landlords thereafter inserted in leases, various special covenants known as indemnification and damage clauses. These provisions, however, did not result in much assistance to landlords upon a tenant's bankruptcy. Although these clauses [fol. 26] usually provide that in the event of bankruptcy, that the landlord could re-enter the premises on his own account and hold the tenant for damages or for loss as stated in the covenant of indemnification—the amount, however, of such damages or such loss ordinarily could only be ascertained at the end of the term. Moreover, these special clauses were ineffectual in bankruptcy for the further reason that the lease pursuant to such clauses were terminated only by the re-entry of the landlord, which occurred after bankruptcy, therefore as the landlord's claim for future rent by way of damages or otherwise did not arise at the time of the adjudication, such a claim again was not provable in bankruptcy.

Landlords after these experiences commenced to insert in leases a new kind of provision known as the ipso facto clause. Such a clause was considered by the Supreme Court of the United States in Kothe v. R. C. Taylor Trust, 280 U. S. 24; the lease therein provided that the filing of a petition in bankruptcy by the tenant would ipso facto terminate the lease, and that upon such termination the landlord would be entitled to recover damages "equal to the amount of the rent reserved in the lease for the residue of the term." At the time of the adjudication, the lease had only two more years to run. Upon the bankruptcy of the tenant, the landlord re-entered the premises, terminated the lease and filed a claim for damages for the rent reserved for the said two years of the balance of the term. In reference to such claim, the Supreme Court stated:

The parties were consciously undertaking to contract for [fol. 27] payment to be made out of the assets of a bankrupt estate—not for something which the lessee personally would be required to discharge. He, therefore, had little, if any, immediate concern with the amount of the claim to be presented; most probably that would affect only those entitled to share in the proceeds of property beyond his control.

"*The broad purpose of the Bankruptcy Act is to bring about an equitable distribution of the bankrupt's estate among creditors holding just demands based upon adequate consideration.* Any agreement which tends to defeat that beneficent desig n must be regarded with disfavor. Considering the time which the lease here involved had to run, nothing else appearing, it seems plain enough that the real design of the challenged provision was to insure to the lessor preferential treatment in the event of bankruptcy. The record discloses no circumstance sufficient to support a contrary view. *If the term were much shorter, or there were facts tending to disclose a proper purpose,* the argument in favor of the lessor would be more persuasive." (Italics mine.)

The Landlord herein by the instant clause of the lease apparently endeavored to overcome the effect of the decision in the Kothe case, by eliminating the objectional rent-acceleration damage feature in the ipso facto clause therein, and by inserting in place thereof the provisions herein, that

upon the bankruptcy of the tenant that the Landlord should be forthwith entitled to receive ipso facto damages "in an amount equal to the amount of rent reserved in this lease for the residue of the term hereof, less the fair rental value [fol. 28] thereof, for the residue of the said term."

Therefore, it becomes important to test the specific damage provision herein with the principle enunciated by the Supreme Court in the Kothe case, to determine whether the instant clause falls within the broad purposes of the Bankruptcy Act, and whether it "tends to bring about an equitable distribution of the Bankrupt's estate herein among the creditors holding just demands based upon adequate consideration." In so applying this test, various elements must be taken into consideration.

Therefore, in view of the long period of time, namely, over thirteen years that the lease herein had still to run at the time of the adjudication, and for which period of time damages are claimed—it is important to note the significant statement by the Supreme Court in the Kothe case concerning the short period of two years involved therein, which was, as follows:

"*If the term were much shorter* or there were facts tending to disclose a proper purpose, the argument in favor of the lessor would be more persuasive." (Italics mine.)

It is also necessary to consider the further statement by the Court, "that if there were facts tending to disclose a proper purpose the argument in favor of the lessor would be more persuasive." Accordingly, the facts and circumstances of the lease must be examined to ascertain the purpose of the ipso facto clause herein, to determine whether it penalizes other creditors of the tenant, and therefore whether it comes within the purposes of the Bankruptcy Act, enunciated as aforesaid in the Kothe case.

[fol. 29] Thus, at the very outset it appears that by the express language of the clause herein, that the ipso facto provision was inserted "for the more effectual securing to the lessor of the rent." Concededly, future rent as such is not provable in bankruptcy. Under such circumstances, can the security clause for the payment of such future rent be regarded with favor as coming within the beneficent designs

of the Bankruptcy Act, so that it may be used as a basis for a provable claim in bankruptcy? Clearly, the purpose of this clause was to make a non-provable claim for future rent or for future damages, if any, into a provable claim. It must be borne in mind that at the time of the adjudication herein there was no rent and that no such default occurred until after adjudication.

The claim herein for damages is predicated solely upon the termination of the lease, pursuant to the clause of the lease herein providing for such termination upon the bankruptcy of the tenant. The legal effect, therefore, sought in Bankruptcy of this ipso facto clause is to convert, at the time of the adjudication herein, the Landlord's unaccrued and future rental into an immediately provable claim for damages, and this to be based upon the difference between the rent reserved in the lease and the supposed present rental value for each year of the remaining thirteen years of the lease. Obviously, such a calculation of damages cannot be made with any degree of accuracy. Such a clause can only result in unfairness to other creditors. The claim presented herein in the huge sum of One hundred seventy-seven thousand, seven hundred and eighty ($177,780) Dol- [fol. 30] lars prevents the assets of the estate from being distributed equitable and ratably among all the ordinary creditors.

After all, the persons to be considered primarily herein are the creditors. The Landlord under the circumstances in this case is not on an even basis with the ordinary creditors. The Landlord is not in the same position with other creditors "holding just demands based upon adequate consideration," and accordingly should not be entitled to an equitable distribution of the Bankrupt's estate herein with such other creditors. This is so because the ordinary creditors have parted with their merchandise, their consideration, and naturally their claims can only be satisfied from the assets which they have contributed or into which their assets have been converted by the Bankrupt and still remain in the estate for distribution. The Landlord, on the other hand, by the very ipso facto clause herein, having terminated the lease, has regained possession of its property, and the consideration of the tenant's obligation for rent—the demised premises herein—has been returned to him.

The Landlord therefore, is in a different situation than the ordinary creditor in this case. Such creditors indeed, would be penalized if the landlord would be permitted, under the guise of this claim, to convert the future rent herein into a present damage claim provable in bankruptcy. Mere language should not be able to create a charge against creditors which otherwise does not exist. Merely changing the label and calling the future unaccrued rent herein immediate damages, ipso facto, should not bring about such an undesirable result to the serious prejudice of the other credi-
[fol. 31] tors herein who hold "just demands based upon adequate consideration" as pointed out heretofore.

Obviously, when the clause herein was inserted the landlord knew that in the event of bankruptcy, it was immaterial to the tenant what claims were provable thereafter against its estate. The tenant corporation was not concerned with its creditors in the event of the bankruptcy and, of course, cared little about the size of the claim that the landlord would assert against the Bankrupt estate.

If the ipso facto damage clause herein is upheld and applied to the lease herein for the balance of the term of thirteen (13) years and three (3) months, the principle thereof would have to be applied to all cases whether the residue of the term be twenty years, forty years or more. It can readily be seen that under such circumstances the amount of damages that could be assessed against the creditors of the estate could result in practically wiping out the rights of all ordinary creditors and defeating the very purpose of the Bankruptcy Act as stated by the Court in Kothe v. R. C. Taylor Trust, (supra). Clearly, such is not the intent or purpose contemplated by the Bankruptcy Act.

Moreover, as heretofore stated, the damages if any, of the landlord could only properly and accurately be ascertained at the expiration of the term. At the time of the adjudication, it was impossible with any degree of certainty to ascertain the fair rental value of the subsequent many years of the term herein. The total amount of rent received for the balance of the term could greatly equal
[fol. 32] or even exceed the amount reserved in the lease and thus would accordingly entirely eliminate the amount of damages calculated by the Landlord under the clause

herein. The measure of damages provided herein is therefore too speculative and conjectural.

This feature as to uncertainty of such damages was stressed and pointed out in the leading case of Roth & Appel, 181 Fed. 667; the lease therein provided:

"In case the lessee is declared bankrupt, the lease shall terminate and the lessor has a right to re-enter, in which case the lessee agrees as part consideration hereof, that it, and its legal representatives, will pay to the lessor and his legal representatives on the first day of each and every month, as upon rent dates, the difference between the rents and the sums reserved and agreed to be paid by the lessee and those otherwise reserved or with due diligence collected, on account of rent of the demised premises for the preceding month, up to the end of the term, remaining at the time of the entry. After bankruptcy the landlord reentered and re-let the premises for the balance of the term at a lower rental."

The Supreme Court therein, in expunging the lessor's claim for an alleged deficiency, stated:

"(2) *In case the lease was terminated, it was uncertain whether there would be any loss in rents. If the rent received by the landlord from the new tenant equaled or exceeded that stipulated in the lease, there would be no loss, and, consequently, no foundation for any claim upon the indemnity covenant*" (Italics mine.)

[fol. 33] The Court in Roth & Appel pointed out that even after re-entry by the Landlord that no immediate cause of action arose; that the landlord's claim for damages only matured when the time for the ascertainment of the deficiency arrived and provided that there was a deficiency at that time. Thus, under the doctrine of this case, it seems that even upon the re-entry and re-letting by a landlord prior to bankruptcy, that a claim for deficiency arising after bankruptcy would not be provable because of the existence of a deficiency at the time for ascertainment under the covenant would still be contingent at the time of the filing of the petition.

The doctrine of Roth & Appel has just been reaffirmed in this district and in this circuit, in the matter of In re

Wise Shoe, Inc., 22 A. B. R., 125 affirmed Second Circuit (April 4th, 1933). Judge Patterson of the District Court in his opinion also stressed the uncertainty and contingency of damage claims for rent accruing in the future by stating:

"* * * Such a claim is said to be to- uncertain at the time of bankruptcy in two respects, first as to whether the landlord will re-enter and thus terminate the lease, and second, as to whether any loss in rents will actually come about. The second uncertainty or contingency is found also in cases like the present one, where the landlord had declared the lease terminated prior to bankruptcy but had not then relet the premises. *It cannot be predicated at the time of the bankruptcy whether there will be any loss.* Hence it is held that in such a case a claim based upon the tenant's agreement to indemnity is not provable" (In re [fol. 34] Service Appliance Co. [D. C. N. Y.] 15 Am. B. R. [N. S.] 478, 39 F. [2nd] 632; In re Goldberg [D. C. N. Y.], 18 Am. B. R. [N. S.] 332, 52 F. [2nd] 156; In re Hubbard [D. C. N. Y.], 20 Am. B. R. [N. S.] 612, 57 F. [2nd] 213).

In re 20th Century Millinery Exchange, S. D. N. Y. 41 F. (2nd) 237 is "*not* an authority squarely in point," as contended for by the claimant. The bankrupt therein was the lessee of certain premises. The lease thereof provided that if the lessee (bankrupt) should be adjudicated a bankrupt or should file a petition in bankruptcy, that

"* * * 'such event shall be deemed to constitute a breach of this lease and thereupon ipso facto and without entry or without other action by the lessor, this lease shall become and be terminated.'"

The lessee (bankrupt) after the making of this lease with the landlord made a sub-lease with the claimant therein at a lower rental, by which agreement with the claimant it was provided:

"'It is understood and agreed that if the present lessor (meaning the bankrupt) commits any breach of covenant in the original lease (meaning between it and its lessor) and by reason of said breach the present lessee (namely the claimant) is compelled to take over said original lease from said Charles Ulin and assume a greater rent than is stipulated in its present lease, the said present lessor (bank-

rupt) shall be obligated to pay the present lessee as its damages the difference between the rent set forth in its [fol. 35] present lease and the original lease (Exhibit A).'"

As a result of the bankruptcy the claimant as sublessee was required to enter into a new agreement with the landlord, and leased the premises at a higher rate, namely, at the same rate of rent which the bankrupt had been paying. The sublessee (claimant) thereupon filed a claim for the difference between the rent reserved in the sublease with the bankrupt and the new rent to be paid to the new landlord. The claim was sustained, and properly so, the Court stating:

"It is not a claim for rents to accrue, which, in this circuit, is not provable, in re Roth & Appel (C. C. A.), 181 F. 667, 31 L. R. A. (N. S. 270), unless the default in the lease has occurred, and the liability has become fixed prior to the filing of the petition (In re Mullings Clothing Co. [C. C. A.], 238 F. 58). It is similar to an obligation to indemnify a surety where the liability has become fixed (Williams v. U. S. Fidelity Co., 236 U. S. 549, 35 S. Ct. 289, 59 L. ed. 713). * * *"

Clearly, the main lease therein having terminated upon the bankruptcy, the claimant's sublease naturally fell also, and the claimant pursuant to the agreement of sublease with the bankrupt immediately had a fixed and absolute claim for damages against the bankrupt in an amount for the difference in the rent stipulated in the sublease made as aforesaid with the bankrupt, and the amount that the claimant was required to pay the landlord as a result of the bankruptcy of the lessee. This was a specific amount and [fol. 36] was fixed in the sublease agreement between the claimant and the bankrupt. There was nothing speculative, uncertain or contingent in regard thereto whatever and represented the claimant's actual fixed loss sustained. Thereupon, upon the facts this decision has no application to the facts in the instant case.

Clearly, as pointed out in the Roth & Appel case and Wise Shoe (supra) and similar controlling authorities in bankruptcy, the method of calculation of the damages provided for in the instant ipso facto clause herein, makes such damages neither fixed nor certain. On the contrary,

the amount thereof is contingent and uncertain both as to existence and as to amount.

In view of all the foregoing, the landlord's claim herein should not be permitted to interfere with the equitable and ratable distribution of the bankrupt's assets among the aforesaid creditors, who are entitled to the protection of the Bankruptcy Act; the allowance of this claim based upon this unreasonable provision for damages for the balance of the term of thirteen (13) years and three (3) months, would minimize the distribution of the assets to such creditors, and would result in penalizing and depriving them of the beneficent design of the Bankruptcy Act. Accordingly, the Trustee's application to disallow and expunge the landlord's claim is granted.

Submit order on two days' notice.

Dated New York, May 25th, 1933.

Irwin Kurtz, Referee in Bankruptcy.

[fol. 37] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DISALLOWING CLAIM

Upon reading and filing the petition of Irving Trust Company, Trustee in Bankruptcy herein, verified the 5th day of April, 1933, the order to show cause filed herein dated the 5th day of April, 1933, and the affidavit of Jack Lisa, verified the 6th day of April, 1933, from which it appears that said petition and order were duly served as therein provided, and the matter having duly come on to be heard before this Court on the 18th day of April, 1933, at eleven o'clock in the forenoon, in pursuance of the provisions of said order to show cause, and after hearing counsel for the interested parties,

It is, on motion of Beekman, Bogue & Clark, attorneys for the Trustee herein,

[fol. 38] Ordered that the claim set forth in the proof of claim numbered 27 filed herein by A. W. Perry, Inc., be, and it hereby is disallowed and rejected that said proof of claim be, and it hereby is, expunged and that no dividend be paid thereon.

Dated New York, N. Y., June 1, 1933.

Irwin Kurtz, Referee in Bankruptcy.

We, the undersigned, attorneys for A. W. Perry, Inc., waive notice of settlement of the above proposed order.

Larkin, Rathbone & Perry.

[fol. 39] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF A. W. PERRY, INC., FOR REVIEW OF REFEREE'S ORDER

Petitioner is a creditor of the above-named bankrupt and as such was a party to the following certain proceedings in said bankruptcy pending before Irwin Kurtz, Esq., as the Referee in Bankruptcy in charge thereof, to wit, the petition of Irving Trust Company, Trustee of the above-named bankrupt, for an order disallowing and rejecting your petitioner's claim, expunging your petitioner's proof of claim herein and ordering that no dividend be paid thereon.

Following the hearing thereof, a final order dated June 1, 1933, was made by said Referee, as follows, to wit: "That the claim set forth in the proof of claim numbered 27 filed herein by A. W. Perry, Inc., be, and it hereby is, disallowed and rejected, that said proof of claim be, and it hereby is, expunged and that no dividend be paid thereon."

[fol. 40] Said order is erroneous in this, that by reason of the provisions of the lease executed by the bankrupt under which your petitioner's claim is made, your petitioner's claim for damages thereunder is a provable claim herein under the acts of Congress relating to bankruptcy, and that said order should not have been made.

Wherefore, petitioner prays that said order be reviewed and reversed, and that he be restored to all things he has lost by reason of said order.

June 12, 1933.

A. W. Perry, Inc., Petitioner, by Larkin, Rathbone & Perry, Attorneys for A. W. Perry, Inc., 70 Broadway, Borough of Manhattan, New York, N. Y.

[fol. 41] IN UNITED STATES DISTRICT COURT

[Title omitted]

REFEREE'S CERTIFICATE OF REVIEW

To the Honorable Judges of the United States District Court, for the Southern District of New York:

I, Irwin Kurtz, Referee in Bankruptcy herein, do hereby certify:

1. On June 1st, 1933 an order was made which granted the application of the Irving Trust Company, as Trustee herein, to disallow and reject the proof of claim of A. W. Perry, Inc. (hereinafter called Claimant) in the sum of One hundred seventy-seven thousand seven hundred and eighty ($177,780) Dollars "as damages for breach of a covenant to pay rent under a lease." This order was based upon the ground that the said claim was in fact for the payment of future rent and as such not provable in bankruptcy.

2. On June 12th, 1933, the Claimant-Petitioner herein feeling aggrieved thereat, filed a Petition for Review.

3. The error complained of is that the claim for damages [fol. 42] under the lease herein is provable in bankruptcy.

4. A summary of the proceedings, the contentions of both the Claimant-Petitioner and the Trustee, and the conclusions of the Referee are fully set forth in the decision dated May 25th, 1933, to which the Court is respectfully referred as to the legal question presented.

5. I hand up herewith the following:

(a) Petition for Review.
(b) Referee's Decision dated May 25th, 1933.
(c) Order sought to be reviewed.
(d) Application of Trustee and Proof of Claim.

Dated New York, June 13th, 1933.

Irwin Kurtz, Referee in Bankruptcy.

This certificate will be on the Bankruptcy Motion Calendar for hearing in the District Court on Wednesday, June 21st, 1933, at 10:30 A. M.

Notice thereof by mail has been given to:

Messrs. Beekman, Bogue & Clark, Attorneys for Trustee, 15 Broad Street, New York City.

Messrs. Larkin, Rathbone & Perry, Attorneys for Claimant-Petitioner, 70 Broadway, New York City.

[fol. 43] IN UNITED STATES DISTRICT COURT

MEMORANDUM OF JUDGE GODDARD

The order of the Referee is in accordance with the decisions and the reasoning of In re Roth & Appel, 181 Fed. 667, and as yet unreported decisions of the Circuit Court of Appeals of this Circuit filed July 18, 1933 in re Brown, et al. v. Irving Trust Company, Manhattan Properties, Inc., v. Irving Trust Company, and in re Metropolitan Chain Stores, Inc. (Claim of Peter Malavazos, et al.)

The order of the Referee is affirmed. Settle order on notice.

July 25, 1933.

Henry W. Goddard, U. S. D. J.

[fol. 44] IN UNITED STATES DISTRICT COURT

In Bankruptcy. No. 55384

In the Matter of OUTFITTERS OPERATING REALTY CO., INC. (Delaware), Bankrupt

ORDER CONFIRMING REFEREE'S ORDER—Aug. 8, 1933

Present: Hon. Henry W. Goddard, Judge.

A. W. Perry, Inc., having filed on June 12, 1933, a petition to review, vacate and set aside an order entered herein by the Referee, dated June 1, 1933, expunging a claim heretofore filed herein by the said A. W. Perry, Inc., and said claim having come on for hearing before the Court on the 5th day of July, 1933.

Now, upon reading and filing the said petition of the aforesaid A. W. Perry, Inc., and on certificate of Hon. Irwin

Kurtz, Referee herein dated June 13, 1933, and all of the papers and proceedings certified to the Court in the said certificate of the Referee, and after hearing Mr. Thomas F. Dougherty, of counsel for said A. W. Perry, Inc., in support of said petition, and Mr. Edward K. Hanlon, of counsel for Irving Trust Company, as Trustee in Bankruptcy herein, in opposition thereto, and after due deliberation, it is, on motion of Beekman, Bogue & Clark, attorneys for [fol. 45] the Trustee in Bankruptcy herein,

Ordered, that the said petition for review of A. W. Perry, Inc., be, and the same hereby is dismissed; and it is further

Ordered, that the said order of the Referee, dated June 1, 1933, be and the same hereby is in all respects, confirmed.

Henry W. Goddard, U. S. D. J.

We hereby waive notice of settlement of the foregoing order.

Dated August 7, 1933.

Larkin, Rathbone & Perry, Attorneys for Petitioners.

[fol. 46] In United States District Court

[Title omitted]

Petition for Appeal

A. S. Perry, Inc., feeling itself aggrieved by the order made herein on August 8, 1933, and entered herein on or about August 11, 1933, confirming in all respects the order made herein by Hon. Irwin Kurtz, dated June 1, 1933, wherein the Honorable Referee disallowed and rejected the claim of said A. W. Perry, Inc., and directed that the same be expunged and that no dividend be paid thereon, and dismissing the petition of A. W. Perry, Inc., dated June 12, 1933, for an order to review the said order of the Referee herein, does hereby appeal from the said order made on August 8, 1933, and entered herein on or about August 11, 1933, to the United States Circuit Court of Appeals for the Second Circuit, for the reasons specified in the assignment of errors which is filed herewith, and prays that this appeal be allowed, and that citation issue as provided by law, and that a transcript of the record, proceedings and papers

upon which said order was made, duly authenticated, may [fol. 47] be sent to the United States Circuit Court of Appeals for the Second Circuit.

And your petitioner further prays that the proper order touching the security to be required of it to perfect its appeal be made.

Dated New York, N. Y., September 5, 1933.

Larkin, Rathbone & Perry, Attorneys for A. W. Perry, Inc., Petitioner, Office and Post Office Address: No. 70 Broadway, Borough of Manhattan, New York, N. Y.

ORDER ALLOWING APPEAL

Petition granted, and the appeal allowed, upon giving bond conditioned as required by law in the sum of Two Hundred and Fifty ($250) Dollars.

Dated September 6, 1933.

Woolsey, United States District Judge.

Bond. Bond in the sum of $250.00 was filed on Sept. 11/33.

[fol. 48] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

Now comes the petitioner, A. W. Perry, Inc., in connection with its petition for appeal herein, and makes the following assignment of errors which it avers were committed by the Court in the rendition of its order against it, and upon which it relies to reverse the order entered herein as appears of record:

1. That the District Court erred in confirming the order of Honorable Irwin Kurtz, Referee in Bankruptcy herein, dated June 1, 1933, disallowing and rejecting the claim heretofore filed herein and ordering that said claim be expunged and that no dividend be paid thereon.

2. That the District Court erred in refusing to reverse said order of Honorable Irwin Kurtz, the Referee herein, made June 1, 1933.

3. The District Court erred in refusing to hold that, by reason of the provisions of the lease executed by the bankrupt, under which the claim of A. W. Perry, Inc., was made, said claim of A. W. Perry, Inc., for damages there-
[fol. 49] under is a provable claim herein under the Acts of Congress relating to bankruptcy.

4. The District Court erred in dismissing the petition of A. W. Perry, Inc., dated June 12, 1933, for an order reviewing the said order of Honorable Irwin Kurtz, the Referee herein.

5. That the order appealed from is contrary to law.

Wherefore, appellant prays that the order of the said District Court of the United States for the Southern District of New York may be reversed and remanded with directions to proceed in accordance with law.

Dated New York, September 5, 1933.

Larkin, Rathbone & Perry, Attorneys for A. W. Perry, Inc., Creditor-Appellant, Office and Post Office Address, No. 70 Broadway, Borough of Manhattan, New York City.

[fol. 50] Citation in usual form omitted in printing.

[fol. 51] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO TRANSCRIPT OF RECORD

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed upon by the parties.

Dated Oct. —, 1933.

Larkin, Rathbone & Perry, Attorneys for Appellant.
Beekman, Bogue & Clark, Attorneys for Appellee.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 52] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

In re OUTFITTERS OPERATING REALTY CO., INC. (a Delaware Corporation), Bankrupt

A. W. PERRY, INC., Appellant,

against

IRVING TRUST COMPANY, Trustee, Appellee

Before L. Hand, Swan, and Chase, Circuit Judges

Appeal from an Order in Bankruptcy of the District Court for the Southern District of New York Expunging the Claim of a Landlord

Thomas F. Dougherty for the appellant.
John A. McNaughton for the appellee.

L. HAND, Circuit Judge:

This appeal raises the provability in bankruptcy of the claim of a landlord under a covenant in a lease which read as follows: "* * * for the more effectual securing to the Lessor of the rent and other payments herein provided, it is agreed as a further condition of this lease that the filing of any petition in bankruptcy or insolvency by or against the Lessee shall be deemed to constitute a breach of this lease, and thereupon, ipso facto, and without entry or other action by the Lessor, this lease shall become and be terminated; and, notwithstanding any other provisions [fol. 53] of this lease, the Lessor shall forthwith upon such termination be entitled to recover damages for such breach in an amount equal to the amount of the rent reserved in this lease for the residue of the term hereof, less the fair rental value of the premises for the residue of said term." The lessee having become bankrupt, the lessor filed its proof of claim under this clause, which the referee expunged as invalid on its face. The judge affirmed the order and the lessor appealed to this court. Meanwhile the Supreme Court on February 5, 1934, affirmed our decision in Manhattan Properties v. Irving Trust Co., and has thus

finally settled it that claims for future rent are not ordinarily provable, and can become so, if at all, only by virtue of special clauses. The question here is whether this clause will serve; its possible validity was specifically reserved in the Supreme Court's opinion.

The contingencies which make such claims unprovable go both to the right of action and to the amount. If the lease contains no covenant of the lessee to pay the equivalent of rent in case of reëntry, any future claim is contingent; it can only be for rent, and the lessor may have reëntered and ended the term before it falls due. Such leases are now rare; ordinarily there is some covenant designed to protect the lessor in case of reëntry. A common form, which was that in In Re Roth & Appel, 181 Fed. Rep. 667 (C. C. A. 2), is to pay on each rent day the difference between the rent reserved and rent received upon any reletting; another is to indemnify the lessor for any loss suffered during the term. The second requires the lessor to wait till the end of the term (Hermitage Co. v. [fol. 54] Levine, 248 N. Y. 333); not so the first, under which a separate cause of action arises at the end of each period. But in both kinds it is uncertain at petition filed whether there will be any loss, and that uncertainty is enough to invalidate the claim. The covenant in the lease at bar avoids both these difficulties. It is not contingent in right, because the mere filing of a petition in bankruptcy puts an end to the lease; not at the lessor's option, but unconditionally. It is not contingent in amount, because at petition filed it is at once ascertainable whether there is a loss and what it is. The fact that the amount of that loss is not fixed in advance is immaterial; the standard of appraisal is prescribed; it involves the kind of determination—that is, the present value of real property—with which a bankruptcy court is entirely familiar and which it is competent to make. The argument contra may be stated as follows: If bankruptcy be an anticipatory breach, as it is, then, in a case where the lessee has promised to pay the loss, the promise or the whole series of promises, is repudiated at once. To calculate the damages, as in the case of other anticipatory breaches, the value of the consideration restored—in this case the land—will be presently estimated by the best means accessible. The

result is exactly the measure to which the parties have themselves agreed in the covenant at bar. If the calculation be too contingent for a bankruptcy claim when there is no covenant, why is there not when there is? This argument loses sight of the real objection to allowing the claim when damages have not been liquidated. That is not because the rule for measuring damages is too vague or uncertain to be manageable in bankruptcy; but that, though it is the best approximation available, it is still only a forecast and a forecast in these circumstances will [fol. 55] not do for bankruptcy which is more rigid as to such issues than other proceedings, an action at law, for example. It is the uncertainty in fact of the loss that invalidates the claim; that is not remedied by an approximation which the law will accept in other connections. But when the parties have agreed that the lessee shall pay a sum to be ascertained by an accessible standard, the bankruptcy court is not liquidating a future loss at all; in its place the parties have substituted a promise, which does not look to the future, which is to pay the difference between two amounts presently ascertainable. The only question is whether that promise is lawful, whether it makes a contract, and as to that we have it on the highest authority that it liquidates "the damages upon a footing familiar and fair." Filene's Sons v. Weed, 245 U. S. 597, 602.

That the occasion was in general apt for the liquidation of damages we need not therefore debate; but there is one doubt that does arise; whether the clause is for a penalty because the future payments are not discounted to their present values. If the lessee must pay at once the sum of a series of installments, each consisting of the difference between the rent reserved on successive rent days, and the estimated rent which will have been received on those days, the recovery will surely be more than compensatory. The present value of such an installment, payable twenty years hence, is very much less than its face. Whether this would invalidate the whole clause under Kothe v. Taylor, 280 U. S. 224, we need not say, because we think that the lease should not be read in that way. We disregard the earlier canon by which all provisions fixing damages were construed as penalties in cases of doubt; the decisions of the Supreme Court no longer give countenance to that notion;

[fol. 56] such clauses are construed without bias. U. S. v. Bethlehem Steel Co., 205 U. S. 105, 119; U. S. v. United Engineering Co., 234 U. S. 236, 241; Wise v. U. S., 249 U. S. 361, 365, 366; Hathaway v. U. S., 249 U. S. 460, 464. So approached, the clause seems to us to admit of a construction in accordance with its patent general purpose to give the lessor indemnity and no more. The damages as liquidated consist of the difference between two amounts each stated as single. The minuend is "the amount of the rent reserved", not the sum of the installments of rent; the subtrahend is "the fair rental value of the premises", again a single sum, and this time phrased as though the term was to be valued like a fee. Of course people do not so value terms, at least ordinarily; they appraise them by the periodic rents obtainable. Probably that was all that was intended here also, but it does not follow that the "rental value of the premises" must be taken by adding the full face of all the estimated future installments. Were a lease to be sold nobody would think of valuing it so; he would discount the future payments. The meaning is indeed doubtful, but as we are not bound to view the language with a hostile eye, we shall construe it to save the clause, and we therefore hold that the proper measure of damage is the sum of the discounted series of installments, each made up of the rent reserved, less the fair rental value for that period. We need not therefore decide whether if future installments were payable at their face the clause would be void as a penalty.

Order reversed; claim remanded for liquidation in accordance with the foregoing.

[fol. 56a] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. In Re Outfitters Operating Realty Co., Inc. Perry v. Irving Trust Co. Opinion. L. Hand, C. J.

[fol. 57] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the court-rooms in the Post Office building in the City of New York,

on the 20th day of February, one thousand nine hundred and thirty-four.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Harrie B. Chase, Circuit Judges.

In the Matter of Outfitters Operating Realty Co., Inc., Bankrupt,

A. W. Perry, Inc., Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed with costs and cause remanded for entry of an order in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 58] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. In re Outfitters Operating Realty Co. Inc. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 20, 1934. William Parkin, Clerk.

[fol. 59] United States of America,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 58, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of In the Matter of Outfitters Operating Realty Co. Inc., Bankrupt; A. W. Perry, Inc., Appellant, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 10th day of April, in the year of our Lord one thousand nine hundred and thirty-four, and of the Independence of the said United States the one hundred and fifty-eighth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

(4852-C)

[fol. 60] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 14, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,572. U. S. Circuit Court of Appeals, Second Circuit. Term No. 22. Irving Trust Company, as Trustee in Bankruptcy of Outfitters Operating Realty Co., Inc., petitioner, vs. A. W. Perry, Inc. Petition for a writ of certiorari and exhibit thereto. Filed April 18, 1934. File No. 22, O. T. 1934.

(5067-C)